

(i) The firm must serve SBA's Associate General Counsel for General Law with a copy of the appeal.

(ii) OHA will determine whether SBA's decision in either case was arbitrary, capricious, or contrary to law. OHA's review is limited to the facts that were before SBA at the time of its decision and any arguments submitted in or in response to the appeal. OHA will not consider any facts beyond those that were already presented to SBA unless the administrative judge determines that manifest injustice would occur if the appeal were limited to the record.

(4) A firm may also request a formal size determination pursuant to part 121 of this title where SBA finds that the firm is not small.

(g) *Current 8(a) BD program participants.* Any firm that is currently a Participant in SBA's 8(a) BD program need not seek an ownership and control determination or apply to SBA for a separate certification as an SDB. SBA will certify current 8(a) BD Participants as SDBs, and automatically include them on the list of qualified SDBs.

(h) *8(a) BD graduates.* SBA will automatically certify a firm that has graduated from the SBA's 8(a) BD program to be an SDB, provided SBA determined that the firm continued to be eligible for the 8(a) BD program as part of an annual review within the last three years. (See § 124.1014(b)).

(i) *Certification by DOT recipient.* If a firm applying for SDB certification has a current, valid certification as a disadvantaged business enterprise (DBE) from a Department of Transportation (DOT) recipient, SBA may adopt the DBE certification as an SDB certification when determined by the AA/SDBCE or designee to be appropriate.

§ 124.1009 How does a firm appeal a decision of a Private Certifier?

Where a Private Certifier performs an ownership and control determination and finds that a firm is not owned and controlled by the individual(s) claiming disadvantaged status, the firm may appeal that decision to OHA pursuant to part 134 of this title. The firm must serve SBA's Associate General Counsel for General Law and the

applicable Private Certifier with a copy of the appeal.

(a) The Private Certifier must submit to OHA the full record upon which its decision was based within two days of receiving notification that an appeal has been filed.

(b) The Private Certifier and SBA may each elect to appear or not appear in an appeal proceeding.

(c) OHA's review is limited to the facts that were before the Private Certifier at the time of its final decision and any arguments submitted in or in response to the appeal. OHA will not consider any facts beyond those that were already presented to the Private Certifier unless the administrative judge determines that manifest injustice would occur if the appeal were limited to the record.

(d) OHA will decide whether it believes that the facts are supported by a preponderance of the evidence the Private Certifier's determination regarding ownership and control.

(e) Where the facts presented in the record leave significant doubt as to whether the petitioner is or is not owned and controlled by one or more individuals claiming to be disadvantaged, the administrative judge may remand the case to the Private Certifier for reconsideration in accord with his or her remand order.

(f) If OHA finds that the firm is owned and controlled by the individual(s) claiming disadvantaged status, OHA will refer the application to SBA for further processing. If OHA finds that the firm is not owned and controlled by such individual(s), the administrative judge will state the reasons for that decision, which will be the final decision of the Agency.

§ 124.1010 Can a firm represent itself to be an SDB if it has not yet been certified as an SDB?

(a) *General rule.* Except as set forth in paragraph (d) of this section, a firm may represent itself to be an SDB concern in order to receive a preference as an SDB for any Federal procurement program if it has submitted a complete application for SDB certification to SBA or a Private Certifier and it has not received a negative determination regarding that application from SBA or